

NO. 2:07-CR-10-FL-1
NO. 2:12-CV-50-FL

Respondent.

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ORDER

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE # 50). On April 12, 2012, the government filed motion to dismiss, arguing that the petition was untimely filed. However, on August 15, 2012, the government filed notice of withdrawal of its motion to dismiss, waived its previously asserted defenses, and informed that it does not oppose resentencing of defendant. Pursuant to 28 U.S.C. § 636(b)(1), United States Magistrate Judge William A. Webb entered memorandum and recommendation ("M&R") on August 17, 2012. The magistrate judge recommends that the court grant petitioner's § 2255 motion, vacate petitioner's sentence, and schedule a re-sentencing hearing. On August 21, 2012, the government filed waiver of the fourteen-day objection period to the M&R, set forth in 28 U.S.C. § 636(b)(1), and signaled agreement with the M&R.

Criminal Act (“ACCA”) enhancement set forth in 18 U.S.C. § 924(e).

Petitioner now argues, and the government agrees, that in light of [United States v. Simmons](#), 649 F.3d 237 (4th Cir. 2011) (en banc), petitioner does not have the requisite predicate felony offenses to warrant ACCA enhancement. Where the government waives defenses previously asserted in motion to dismiss and further signals agreement with the magistrate judge’s recommendations, the court, upon review of the M&R and finding no clear error, ADOPTS the recommendations of the magistrate judge, GRANTS petitioner’s motion to vacate, and VACATES petitioner’s sentence. Re-sentencing is set for Tuesday, September 18, 2012, at 1:30 p.m., at the United States Courthouse in New Bern, North Carolina.

SO ORDERED, this the 23rd day of August, 2012.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style.

LOUISE W. FLANAGAN
United States District Judge